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SEP. 23 1946

No. 326 7

In the Supreme Court of the United States

OCTOBER TERM, 1946

JAMES F. MORRIS, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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OPINIONS BELOW

The conclusions of law of the District Court (R. 39) are not officially reported. The opinion of the Circuit Court of Appeals (R. 48–54) is reported at 155 F. 2d 832.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 29, 1946 (R. 47). The petition for certiorari was filed on August 21, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether employees engaged in intrastate transportation between plants of unfinished steel and steel products used in the manufacture of automobiles, trucks, trailers, and machinery destined for interstate shipment are engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act.

2. Whether employees who work only occasionally or only a few hours a week in interstate transportation are within the exemption provided by Section 13(b)(1) of the Act.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 7–8.

STATEMENT

Petitioner operates a general cartage business in and about Detroit, Michigan (R. 11). Approximately 97 percent of his operations consists of the interplant transportation of unfinished steel in the course of its manufacture and the transportation of finished steel from the mills in Michigan where it is produced to the plants of automobile manufacturers in Detroit (R. 12–13). After further processing, the unfinished steel which petitioner transports is shipped in interstate commerce (R. 12). The finished steel transported consists principally of bumper stock, fender stock, and other types of steel commonly used in the manufacture of automo-

biles and parts (R. 14). This steel is used in the production of automobiles and subsequently moves in interstate commerce as part of the finished automobile (R. 14).

The remaining 3 percent of petitioner's business consists of miscellaneous local cartage of a pickup and delivery character, some of which involves the handling of goods in transit to or from points outside the State of Michigan (R. 13). A large majority of petitioner's drivers do not engage in such pickup and delivery transportation in the average workweek (R. 16). Truck drivers who do engage in such activities in any workweek also engage in interplant transportation as described above during much the greater portion of the time (R. 15–16).

Petitioner employs approximately 40 truck drivers, 14 mechanics and laborers, 3 dispatchers, and 3 office workers (R. 11). All except the office workers have been employed for hours in excess of the statutory straight-time maximum and none has received overtime in accordance with the requirements of the Act (R. 16–18).

The respondent brought suit to restrain petitioner from violating the Fair Labor Standards Act. The case was heard on stipulated facts, and the district court held that defendant was not engaged in the production of goods for commerce, and that the employees were also exempted from the Act by the provisions of Sections 13 (a) (1) and 13 (b) (1). (R. 39). The judgment was

reversed on both points by the circuit court of appeals (R. 48–54).

ARGUMENT

1. Petitioner urges that his employees are engaged in the "local" business of hauling freight within a single metropolitan area, and that although the goods are hauled for use in the manufacture of products to be shipped interstate, the employees are not engaged in the "production" of goods for commerce within the coverage of the Fair Labor Standards Act. Section 3 (j) defines "produced" as including "transporting," and it is well established by a consistent line of decisions in the circuit courts of appeal that intrastate transportation necessary to production for interstate commerce is covered by the Act. *Walling* v. *Comet Carriers,* 151 F. 2d 107 (C. C. A. 2), certiorari denied on this point, 326 U. S. 716; *Rockton & Rion R. R. Co.* v. *Walling,* 146 F. 2d 111 (C. C. A. 4), certiorari denied, 324 U. S. 880; *Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F. 2d 655 (C. C. A. 10); *Griffin Cartage Co.* v. *Walling,* 153 F. 2d 587 (C. C. A. 6); *Walling* v. *Kreinbring,* 155 F. 2d 727 (C. C. A. 6); *West Kentucky Coal Co.* v. *Walling,* 153 F. 2d 582 (C. C. A. 6); *Bowie* v. *Gonzalez,* 117 F. 2d 11, 20 (C. C. A. 1); *Calaf* v. *Gonzalez,* 127 F. 2d 934, 936 (C. C. A. 1). Inasmuch as this Court specifically declined to review this precise question in the *Comet Carriers* case at the last term, it does not seem necessary to elaborate on this issue.

2. Section 13 (b) (1) of the Fair Labor Standards Act exempts from the overtime provisions of the Act "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." The second question presented is whether this exemption extends to truck drivers who spend a small proportion of their time driving in interstate commerce. This question is similar to that presented in *Levinson* v. *Spector Motor Service* and *Pyramid Motor Freight Corp.* v. *Ispass,* pending in this Court as Nos. 22 and 41, respectively, and virtually identical to that on which certiorari was granted in *Comet Carriers* v. *Walling,* 326 U. S. 716, subsequently dismissed on motion of the petitioner, May 6, 1946.

In the *Levinson* and *Ispass* cases the employees were engaged for a small part of their working hours in loading trucks which thereafter moved in interstate commerce.[1] In the instant case, as in the *Comet* case, the employees devote even a smaller proportion of their time to interstate driving.[2] Common to all the cases is the question whether the performance of any amount of ex-

[1] The Commission has asserted that loaders affect safety of operations so as to fall within its jurisdiction. *Ex parte No. MC-2,* 28 M. C. C. 125.

[2] In the great majority of weeks, as we have pointed out, the employees engage in no interstate driving (R. 16).

empt work in a workweek will render the exemption applicable for the entire workweek. The instant case is the only one of those presently before the Court to which the Administrator is a party. Inasmuch as the question is of importance in the administration of the Act and is closely related to those involved in cases now pending in this Court, we do not oppose the granting of the petition on this question.

CONCLUSION

We respectfully submit that the petition for certiorari should be denied as to the first question and granted as to the second question presented.

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Solicitor General.

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Solicitor,

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SEPTEMBER 1946.

APPENDIX

PERTINENT STATUTORY PROVISIONS

Fair Labor Standards Act (c. 676, 52 Stat. 1060, 29 U. S. C. 201):

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.
>
> SEC. 13. * * * (b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; * * *.

Motor Carrier Act, 1935 (49 Stat. 543, as amended, 49 U. S. C. 303, 304):

> SEC. 203. (14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce

of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

SEC. 204. It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

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